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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

QUINCY JEROME JACKSON, JR.,

Defendant and Appellant.

C086509

(Super. Ct. No. 62149231)

A jury found defendant Quincy Jerome Jackson, Jr., guilty of second degree robbery and possessing a firearm as a felon. It also found he had suffered a prior violent or serious felony. The trial court imposed a 26-year aggregate term, which included a five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)).¹

On appeal, defendant contends remand is required to allow the trial court to consider exercising its discretion to strike the prior serious felony enhancement under the

¹ Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

newly enacted Senate Bill No. 1393 (2017-2018 Reg. Sess.), Stats. 2018, ch. 1013 (SB 1393). We will remand to allow the trial court to do so. We will also modify the judgment to correct an error in the custody credit calculation.

FACTUAL AND PROCEDURAL BACKGROUND

The Charged Offense

The victim was driving through a McDonald's drive-through at night. When she lowered her driver's side window, defendant approached. He was wearing a black hooded sweatshirt and a bandana over his face. He also had a gun.

He put the gun against the victim's forehead. When the victim started screaming, defendant jammed the gun into the victim's temple repeatedly yelling, "shut up." He then reached across the victim to the passenger seat, took her backpack, and ran off.

A shift manager at McDonald's saw the robbery on the video feed. Then, through the drive-through window, she saw defendant running towards a nearby wall. The manager shouted, "Hey," and defendant briefly turned towards her, before climbing the wall out of sight. The manager called 911.

Shortly after that, the manager saw defendant and two other men running up the stairs of a nearby hotel. They appeared to go into one of the hotel rooms.

Responding officers set up a perimeter around the hotel. One officer saw defendant come out of room 240 on the upper floor and walk down the staircase. They detained defendant.

Defendant told officers he was staying in room 240 along with two others. Inside room 240, officers found a black hooded sweatshirt and the victim's bag. They also found a loaded revolver. DNA on the sweatshirt matched defendant.

Later that evening, the victim identified defendant and her backpack.

Verdict and Sentencing

A jury found defendant guilty of second degree robbery (Pen. Code, § 211) and found he had used a firearm in the commission (§§ 12022.5, 12022.53, subd. (b)). It also

found him guilty of possessing a firearm as a felon (§ 29800, subd. (a)(1)) and found he had suffered a prior violent or serious felony conviction. The trial court found defendant in violation of probation in a separate case (No. 62144407B).

On January 4, 2018, defendant was sentenced. The trial court referenced the “tragic circumstance in this case,” noting defendant is only 20 years old—before adding, “I’m going to abide by the law that the People of this state have imposed upon me to do as a judge.” The court noted the crime involved a “life-threatening robbery at gunpoint,” and cited the victim’s impact statement that it was the most terrifying thing she had experienced and did not expect to live through it.

The court then listed circumstances in aggravation related to the crime, including that the crime involved great violence, it was far more serious than other instances of the same crime, the victim was particularly vulnerable, and the crime’s manner indicated planning, sophistication, or professionalism. Regarding circumstances in aggravation related to defendant, the trial court noted defendant’s current offense and past convictions were violent and serious, indicating he presents a serious danger to the community. Further, he had been on formal probation for only a couple of months before committing his current crime.

The trial court noted the probation report had cited no mitigating circumstances with respect to the crime or defendant. Nevertheless, the court explained mitigating facts existed and pointed to a statement defendant’s mother had made to the court. Defendant’s mother explained defendant had been raised by a single mother, and he had to look after his three brothers while his mother worked multiple jobs. He had also been diagnosed as bipolar when he was eight.

The court however concluded that the circumstances in aggravation outweighed those in mitigation and imposed a 26-year aggregate term, calculated as follows: a 10-

year term for the robbery (the upper term doubled for the strike),² a 10-year firearm enhancement (§ 12022.53, subd. (b)),³ a five-year prior serious felony enhancement (§ 667, subd. (a)(1)), and a one-year consecutive term (one third the midterm) for defendant's probation revocation case. The court also imposed and stayed, under section 654, a six-year term for possessing the firearm (the upper term doubled for the strike), and a four-year firearm enhancement (§ 12022.5, subd. (a)(1)).

The court awarded 465 days of custody credit (405 actual, 60 conduct) in defendant's current case and 327 days (177 actual, 150 conduct)⁴ in the probation revocation case. The court also awarded various fines and fees.

DISCUSSION

I. SB 1393

On appeal, defendant contends remand is required to allow the trial court to consider exercising its discretion under SB 1393 to strike the prior serious felony enhancement. We agree.

On September 30, 2018, the governor signed SB 1393, which gives trial courts the authority to strike a section 667, subdivision (a) prior serious felony enhancement, effective January 1, 2019. (Stats. 2018, Ch. 1013) The People agree that, as to defendant, SB 1393 applies retroactively. Nevertheless, the People maintain remand is unwarranted because the trial court clearly indicated it would not have dismissed defendant's serious felony enhancements had it discretion to do so. The People point out that at sentencing, the trial court called the robbery "a life-threatening robbery," noting

² The probation report had recommended the middle term for robbery.

³ The prosecution's sentencing brief noted the court had discretion to dismiss the firearm enhancement under Senate Bill No. 620 but urged it not to do so.

⁴ As explained below, this was an erroneous calculation.

the victim had described it as “the most terrifying thing that has ever happened to me” The court found the crime involved great violence, it was “far more serious than other instances of the same crime,” the victim was particularly vulnerable, and the crime was carried out in a manner indicating planning, sophistication, or professionalism. And defendant had previously engaged in violent conduct and presented a serious danger to the community. Further, the trial court found no mitigating factors beyond defendant’s mother’s explanation that defendant suffered from bipolar disorder. The People also note that the trial court declined to exercise discretion to strike defendant’s prior strike or the firearm enhancement under the then newly enacted Senate Bill No. 620.

We agree that SB 1393 applies retroactively. If an amended statute “lessening punishment becomes effective prior to the date the judgment of conviction becomes final then . . . it, and not the old statute in effect when the prohibited act was committed, applies.” (*In re Estrada* (1965) 63 Cal.2d 740, 744.) SB 1393 took effect before defendant’s conviction becomes final, and therefore it applies retroactively. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306.)

As to whether remand would be unwarranted, we recognize the many indicia the People cite, which could indicate how the trial court might exercise discretion as to SB 1393. Still, the trial court referenced the “tragic circumstance” in the case, and noted defendant’s young age and other mitigating circumstances offered by defendant’s mother. Thus, we are not convinced the record provides “a clear indication” the trial court would decline to exercise discretion afforded by SB 1393. (Cf. *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 [“Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so”].) We will therefore remand to allow the trial court an opportunity to do so.

II. The Custody Credit Calculation

Finally, we have uncovered an error in the calculation of custody credits. In awarding credits in defendant's probation revocation case (62-144407B), the trial court calculated defendant's conduct credits at 85 percent instead of 15 percent. In doing so, the court awarded defendant 150 days conduct credit for a total of 327 days credit. The conduct credits to which defendant was entitled was 15 percent because the underlying conviction was a robbery (§ 2933.1). Thus, from the 177 days served, defendant should have been awarded 26 days of conduct credits, for a total of 203 days credit. We will modify the judgment to award that amount. (See *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 [incorrect calculation of legally mandated custody credits is an unauthorized sentence that may be corrected at any time].)

DISPOSITION

The judgment is modified to award 203 days of custody credit (177 actual, 26 conduct) in case 62-144407B. The cause is remanded to allow the trial court to consider exercising its discretion under SB 1393. The trial court is directed to prepare an amended abstract of judgment reflecting the modified award of custody credit, as well as any change to the sentence on remand, and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

/s/
MURRAY, J.

We concur:

/s/
RAYE, P. J.

/s/
DUARTE, J.